No. 10,505

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINDA H. HALE,
Appellant,

vs.

CLIFFORD C. ANGLIM, Individually, and as Collector of Internal Revenue for the First District of California,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the District Court (R. 10-18) is reported in 49 F. Supp. 837.

JURISDICTION.

This appeal involves income taxes for the calendar year 1937 in the amount of $3757.93. The taxpayer, plaintiff below, who was at all times mentioned herein a resident of the City and County of San Francisco, State and Northern District of California, on March

14, 1938, filed with the defendant Collector her income tax return for the year 1937, and during the year 1938, paid all of the tax shown to be due in that return. On or about March 8, 1941, taxpayer filed a claim for refund with defendant in the sum of $3757.93. On November 21, 1941, the Commissioner rejected the claim for refund. (R. 20.)

On October 22, 1942, taxpayer instituted a suit in the District Court for the Northern District of California, for recovery of taxes paid under the provisions of Section 24, Fifth, of the Judicial Code, as amended. (R. 2-8.) The judgment of the District Court, denying taxpayer's claim in full, was entered on May 13, 1943. (R. 25.)

Notice of appeal to this Court was filed on June 18, 1943. (R. 66.) Jurisdiction is conferred on the Court by Section 128(a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

1. Taxpayer received the amount of $6230 as dividends earned on certain stock after the date of her husband's death. That stock, as well as other property, was received by taxpayer in satisfaction of her asserted community property interest in her husband's estate as that interest existed at the date of his death. The issue here is whether the $6230 income was likewise received in satisfaction of taxpayer's community property interest and is thus excludable from taxpayer's gross income under Section 22(b)(3) of the

Revenue Act of 1936, as property acquired by bequest, devise or inheritance, or whether that income was distributed to taxpayer as income earned during the course of administration and "properly paid" to her so as to be includable in her income under Section 162(c) of the Revenue Act of 1936.

2. Taxpayer received during the taxable year the sum of $5450 as dividends earned on certain stock after the date of her husband's death. That stock has been left in a testamentary trust by taxpayer's husband, the income to be paid to her for life. The issue here is whether taxpayer was legally entitled to receive the $5450 so as to constitute that amount income "properly paid" to her within the meaning of Section 162(c) of the Revenue Act of 1936, and thereby includable in her taxable income.

STATUTE INVOLVED.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 22. GROSS INCOME.

*   *   *   *   *   *   *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

*   *   *   *   *   *   *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

*   *   *   *   *   *   *

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

STATEMENT.

The pertinent facts as found by the District Court and as appear in the record are as follows (R. 21-24):

The items of income which taxpayer included in her income tax return for the year 1937, and which she claims ought not to have been included in that return, were dividends amounting to $6230 and $5450, which were paid on stocks owned by her deceased husband at the date of his death, and which accrued and were paid after his death, under the circumstances hereinafter set forth. (R. 21.)

Taxpayer is the widow of Prentis Cobb Hale, Senior, who died November 18, 1936, leaving an estate subject to federal estate taxes of the approximate value of $2,000,000. In addition to legacies not involved herein, he made his son the residuary legatee and left his wife the income from a trust established by clause 13 of his will. In clause 13, he bequeathed to the Bank of America, as trustee, certain houses and furnishings in San Francisco and certain parcels of real property situated in other parts of California, and, in addition, 18,000 shares of capital stock of Hale Brothers Stores, Inc., 200 shares of capital stock of Hale Real Estate Company, and 8000 shares of capital stock of Transamerica Corporation. The trustee was to hold the trust fund for the benefit of the taxpayer and to pay the income therefrom during her life and on her death the trust fund was to be distributed to her son, Prentis Cobb Hale, Jr., who was also the residuary legatee of the estate. All of such property was included in the estate tax return of the estate for estate tax purposes. (R. 21-22.)

Taxpayer was dissatisfied with the terms of the will and asserted that a portion of the property of the estate devised by her husband was property in which she had a community interest under the laws of the State of California. A controversy about the matter between the taxpayer and her son resulted in a compromise agreement between them by which it was agreed that taxpayer had a community interest in property of her deceased husband amounting to more than $680,000 and that the fair market value of one-half thereof to which taxpayer was entitled exceeded $340,000. The decedent's will directed that in the event that taxpayer asserted a claim to a community interest in his property, the value of her community interest should be taken from the property bequeathed by clause 13 of his will. (R. 22.)

As a result of the compromise agreement and the provisions in the will, there was distributed to the taxpayer all of the real property and furnishings referred to in clause 13, and 8000 shares of Hale Brothers Stores, Inc., 2000 shares of Transamerica Corporation and 150 shares of Hale Real Estate Company, and there was distributed to the residue of the estate 6000 shares of Transamerica Corporation. As a result of this agreement the testamentary trust created in clause 13 received in trust only 10,000 shares of Hale Brothers Stores, Inc. and 50 shares of Hale Real Estate Company. A decree of distribution was entered on July 14, 1937, distributing to the taxpayer the above described properties, and a decree of distribution was entered on July 29, 1937, distributing to the trustee the trust properties. (R. 22-23.)

Previous to the distribution made on July 14, 1937, dividends amounting to $6230 accrued between the death of the decedent and July 14, 1937, upon the stocks distributed to taxpayer. These dividends were paid from time to time to the executors of the estate by the issuing corporations and the executors credited them to the trust up to July 14, 1937. Thereafter the executors distributed these dividends to the plaintiff pursuant to a decree of ratable distribution dated December 22, 1937, and pursuant to the compromise agreement referred to above. (R. 23, 49-51.)

Previous to the distribution to the trustee on July 29, 1937, dividends accrued upon those shares of stocks which were distributed to the testamentary trust in the amount of $5450. These dividends accrued between the date of death and July 29, 1937, when the Bank of America became the distributee of the shares of stock as trustee under the decree of distribution of that date. The executors had received these dividends from time to time and had credited them to the trust. Pursuant to the decree of ratable distribution entered on December 22, 1937, these dividends were distributed to the trustee. They were thereafter paid to the taxpayer who, by the terms of clause 13 of the will, was entitled to receive all income from the trust property and estate during her lifetime. (R. 23, 47, 49-51.)

The executors in their income tax return for the estate reported all of the above mentioned dividends, but deducted them under Section 162(c) of the Revenue Act of 1936, as having been properly distributed to the beneficiary entitled to receive them. The taxpayer included all of these dividends in her tax return and paid the taxes on them. These are the taxes which she now seeks to recover, and which recovery the District Court denied. (R. 23-24.)

SUMMARY OF ARGUMENT.

I.

The income item of $6230 was received by taxpayer from her husband's estate as income. It represented no part of the property received by her in satisfaction of her asserted community property interest in her husband's estate as that interest existed at the date of his death. The compromise agreement specifically enumerates particular items of real and personal property as being received by taxpayer in satisfaction of her community property interest. The $6230 income is not included in that property. Taxpayer received that income under an entirely separate provision of the compromise agreement, and, presumably only because it represented income subsequently earned on property in which she possessed an interest at the date of her husband's death.

Moreover, the California court decree, which distributed to taxpayer the property received by her in satisfaction of her community property interest, referred only to the specific items of real and personal property listed in the compromise agreement. The income of $6230 was distributed as income to taxpayer by a later separate court decree which in no way purported to distribute that amount in satisfaction of taxpayer's community property interest in her husband's estate.

Since the item of $6230 represents income earned by the estate during the course of administration, and "properly paid" as such to taxpayer during the taxable year, it was correctly included in her taxable income.

II.

Taxpayer was legally entitled to the income item of $5450, which represents income earned on securities subsequent to her husband's death and prior to the time those securities were distributed under court order to the trustee. As income beneficiary of the trust, taxpayer was entitled to all income earned subsequent to her husband's death, for the California law applies that rule to widow beneficiaries as well as beneficiaries of trusts for support and maintenance. The trust created in taxpayer's favor in the instant case falls within both classifications.

Since the $5450 was "properly paid" to taxpayer during the taxable year under any view of her husband's will, it was correctly deducted from the income of the estate and included in taxpayer's taxable income.

ARGUMENT.

I.

THE INCOME ITEM OF $6230 WAS RECEIVED BY TAXPAYER FROM HER HUSBAND'S ESTATE AS INCOME AND WAS THUS PROPERLY INCLUDED IN HER TAXABLE INCOME UNDER SECTION 162(c) OF THE REVENUE ACT OF 1936.

The first item of income here involved is the sum of $6230 representing dividends received by taxpayer on various shares of stock, which shares she received under the compromise agreement entered into with her son in satisfaction of her asserted community property interest in the property left by her decedent husband. Taxpayer contends that the sum of $6230 has the same status as the $338,672 worth of property which she acquired under the compromise agreement, i.e., that both items were received in satisfaction of her claimed community property interest in the estate of her husband, and that both items, therefore, are, under the doctrine of *Lyeth v. Hoey,* 305 U. S. 188, excludable from gross income under Section 22(b)(3) of the Revenue Act of 1936, *supra,* as property acquired by bequest, devise, or inheritance. The Government concedes that the $338,672 worth of property received by taxpayer under the compromise agreement is exempt from income as property so acquired; and no effort has been made by the Commissioner to include that item in taxpayer's taxable income. The $6230 income earned on that property, however, the Government contends is properly taxable to taxpayer as income received by the estate of taxpayer's husband during the period of administration, and "properly paid" to taxpayer within the meaning of Section 162(c) of the Revenue Act of 1936, *supra.*

Taxpayer's entire argument is bottomed upon the premise that, as a result of the compromise agreement, both the $338,672 real and personal property, and also the $6230 income earned by that property during the course of administration, were received by her in satisfaction of her asserted community property interest in her husband's estate. We think that consideration of the pertinent facts here involved will demonstrate the fallacy of taxpayer's position.

An examination of the compromise agreement entered into by taxpayer on June 18, 1937, reveals the following: It is first provided that both parties thereto determined and accepted (R. 39-40) "the * * * sum of $340,000 as the fair net value * * * of the * * * one-half interest in the * * * community property at the time of the death of * * * [decedent] to which the * * * [taxpayer was] entitled under the laws of * * * California, as the surviving wife'' of the decedent. As a result of that determination the agreement goes on to provide that there should be released and distributed by a decree of partial distribution to the taxpayer three specifically enumerated items of real property together with certain shares of stock of four corporations, having a total value of $338,672 *''in satisfaction of the said one-half interest in the said community property to which the said Linda Hoag Hale is entitled as aforesaid''*. (Italics supplied.) (R. 40-41.) It is to be observed that in determining what property taxpayer was entitled to in satisfaction of her asserted community property claim, there was included only the specific items of real and personal property above mentioned, and it was expressly provided that that particular property was received in satisfaction of taxpayer's one-half interest in the community property of decedent. The $6230 income earned by those properties during the course of administration was not included in determining the value of the property taxpayer received in satisfaction of the asserted one-half interest in the community property at the time of the death of her husband to which the taxpayer was entitled. It was an entirely separate provision[1] of the compromise

[1]The provision releasing $338,672 worth of property to taxpayer in satisfaction of her community property interest is found in paragraph one of the compromise agreement. The $6230 income item here involved was allotted to taxpayer in paragraph eight. (R. 40-42.)

agreement, in no way designated as being in satisfaction of taxpayer's community property claim, which set forth that taxpayer was to receive dividends earned since the date of her husband's death on these shares of stock which had been previously alloted to her in satisfaction of her asserted community property claim. We think it clear, therefore, that by the express terms of the compromise agreement, taxpayer received in settlement of her community property interest only the $338,672 property expressly designated as being so received. The $6230 income earned on that property subsequent to decedent's death was allotted to taxpayer, not because it represented part of the value of her claimed community property interest as that interest existed upon the date of her husband's death but presumably because it represented income earned on that property interest subsequent to her husband's death, and to which she was therefore entitled. See *Estate of Daly,* 202 Cal. 284.

That taxpayer received only the specific real and personal property valued in the compromise agreement at $338,672, and not any of the income earned thereon, in complete satisfaction of her asserted community property interest is made even more clear by the fact that the decree of distribution handed down on July 14, 1937, by the Superior Court of California distributed to taxpayer, in accordance with the terms of the compromise agreement, only "the items of property, real and personal hereinafter particularly described, * * * in satisfaction of the * * * [taxpayer's] one-half interest in the * * * community property". (R. 52.) The property described by the court as being distributed in satisfaction of taxpayer's community property interest consisted solely of the seven items of property set forth in the compromise agreement as being valued at $338,672. (R. 40, 53-54.) It is apparent, therefore, that the court was of the opinion that only such property, and no other, was being received by taxpayer in settlement of the community property interest which she possessed in her husband's estate at the date of his death. Nowhere in the court's decree is any mention made of the $6230 income received by the estate subsequent to decedent's death. On the contrary, that income, as such, was distributed to taxpayer, under the authority of an entirely separate court decree dated December 22, 1937, which decree purported simply to distribute the income on that property which had been previously distributed to taxpayer in satisfaction of her asserted community property interest in her husband's estate at the time of his death. That later decree of December 22, 1937, in no way purported to distribute the $6230 income as part of her asserted community property interest in her husband's estate. If, as the taxpayer contends, the income earned after the date of her husband's death is to be deemed part of the property distributed to her in settlement of her community property interest, we can see no reason for the court handing down a separate decree at a later date, setting aside to taxpayer, the income received on specific properties previously distributed to her in satisfaction of her community property interest in her husband's estate. Quite clearly the California court regarded the $6230 income item as no part of the particular property which taxpayer had previously received in satisfaction of her community property interest, but rather regarded that sum simply as income subsequently earned on property in which taxpayer possessed an interest on the date of her husband's death.

We submit, therefore, the facts are plain that taxpayer did not receive the $6230 item here in question in satisfaction of her asserted community property interest in her husband's estate; only the specific properties valued at $338,672 were received as such. The compromise agreement expressly so provided, and the two decrees of the California court so recognized. As such the $6230 income, unlike the $338,672 specific property, cannot be said to have been exempt from taxpayer's gross income as property acquired by bequest, devise or inheritance within the meaning of Section 22(b)(3) of the Revenue Act of 1936.[2] Rather, that item represents income earned and received by the estate during the course of administration, and "properly paid" by it during its taxable year to the beneficiary entitled thereto. Section 162(c) of the

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[2]In addition to arguing that the $6230 income item as well as the $338,672 worth of property was received by her in satisfaction of her community property interest taxpayer also contends in the alternative that both sums were "received by her as an heir under Article Fourth of her husband's Will" (Br. 28) which permitted her to have that portion of his property which was established as representing her community property interest. It is apparent, however, that both contentions of taxpayer are predicated upon the premise that the $6230 income earned subsequent to her husband's death, was received by her in satisfaction of her community property interest as it existed on the date of his death. As previously pointed out, only the specific items of property valued at $338,672 were so received.

Revenue Act of 1936, *supra*. That income, therefore, although originally included in the gross income of the estate was properly deducted[3] by it in computing its net income. Having been "properly paid"[4] to the tax-

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[3]Taxpayer's argument that the $6230 income item, being a part of the gross income of the estate, could not be assigned by it so as to avoid taxability thereon misconceives the nature of the problem here presented, and completely ignores the plain mandate of Section 162(c) of the Revenue Act of 1936. We are not dealing here with the case of an assignment of income. We are, rather, dealing with the deduction allowed an estate in computing its net income for the taxable year, for any income received by it during the course of its administration and "properly paid" during the year to the beneficiary entitled thereto, in which case the amount so deducted is to be included in the net income of the beneficiary.

Likewise the so-called "coincidence" of the receipt and distribution of such amount during one taxable year, which taxpayer urges (Br. 26) should be ignored in the present case, is the precise condition which Section 162(c) expressly lays down as a requirement for permitting the deduction to the estate and imposing the tax upon the beneficiary.

[4]In this connection, there can be no question that taxpayer was entitled to the $6320 income earned after the date of her husband's death upon the specific property which was distributed to her by her husband's estate. *Clayes v. Nutter*, 49 Cal. App. 148, and *Estate of Brown*, 143 Cal. 450, relied upon by taxpayer, concern only the case of income from a testamentary trust. Their pertinency, if any, to the present proceedings, is with respect to the $5450 income item, discussed, *infra*, in the Government's brief. Moreover, we have here an order of a state court of competent jurisdiction expressly authorizing and directing, in accordance with the terms of the compromise agreement, the payment of the $6230 income item to taxpayer. The propriety of that distribution cannot, therefore, be questioned here. *Freuler v. Helvering*, 291 U.S. 35; *Letts v. Commissioner*, 84 F. (2d) 760 (C. C. A. 9th); *De Brabant v. Commissioner*, 90 F. (2d) 433 (C. C. A. 2d).

It is interesting to note that taxpayer, after vigorously contending (Br. 20-21) that neither the specific property valued at $338,672 nor the $6230 income thereon was received by reason of her interest under the testamentary trust created by her husband's will (which the Government does not deny), but rather was bequeathed to her as an heir (Br. 28), promptly proceeds to dismiss the pertinency of *Estate of Daly, supra*, upon the ground that that case did not involve income from property left in trust (Br. 33-34).

payer beneficiary during the taxable year, that amount is to be included in computing the net income of taxpayer. Section 162(c) of the Revenue Act of 1936 expressly so provides.[5] Cf. *Rosenberg v. Commissioner,* 115 F. (2d) 910 (C. C. A. 9th).[6]

II.

THE INCOME ITEM OF $5450 WAS "PROPERLY PAID" TO TAXPAYER WITHIN THE TAXABLE YEAR AND WAS THUS CORRECTLY INCLUDED IN HER TAXABLE INCOME UNDER SECTION 162(c) OF THE REVENUE ACT OF 1936.

The second item of income here involved relates to the sum of $5450, representing dividends on those

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[5]We agree with taxpayer that the income herein involved was initially correctly included in the gross income of the estate. However, it is pertinent to note that it might well be argued that, as a result of the compromise agreement, the taxpayer's community property interest never became subject to administration as part of her husband's estate. The court decree approving that agreement could well be said to have related back to the date of decedent's death and as having determined taxpayer's property interest in her husband's estate at that time. Under this view, any income subsequently earned on that property interest would be taxable to her directly, and would never be a part of the gross income of the estate. Cf. *Rosenberg v. Commissioner,* 115 F. (2d) 910 (C. C. A. 9th).

[6]In the *Rosenberg* case (p. 912), deduction for income earned during the course of administration was denied the estate upon the ground that the estate did not pay the income to the legatee.

Taxpayer also argues (Br. 17) that if it was proper for the estate to report as taxable income the dividends on the 6000 shares of Transamerica stock allotted to testator's son, then the estate should also be taxable on similar dividends distributed to taxpayer. It is not clear that it was "proper" for the estate to be taxed to the extent of any dividends which it actually distributed to the son. However, it appears from the record (R. 59) that all of the dividends which were actually distributed were correctly charged to the distributees. Those that were not so distributed were reported by the estate.

shares of stock which ultimately comprised the property of the testamentary trust set up in decedent's will after taxpayer, by virtue of the compromise agreement, had removed from the estate certain other stock and specific real property in satisfaction of her asserted community property interest in her husband's estate. The dividends amounting to $5450 had been earned after the death of taxpayer's husband and were received by the executors prior to July 29, 1937, the date upon which the corpus of the testamentary trust was distributed to the trustee by order of the California court. (R. 23, 57.) On December 22, 1937, by virtue of a separate court order,[7] the income of $5450 was distributed to the trustee, which, in accordance with the terms of the testator's will, distributed that income to taxpayer during the taxable year. The Commissioner, therefore, included that sum in taxpayer's income as representing income "properly paid" to her within the meaning of Section 162(c) of the Revenue Act of 1936.

Although taxpayer received this income from the trustee during the taxable year, she contends that she was not legally entitled thereto and that it therefore does not represent income "properly paid" to her within the meaning of Section 162(c). Taxpayer thus asserts that that item is taxable to the estate rather

[7]The income item of $5450 was distributed under the same court decree which distributed the income item of $6230, previously discussed. (R. 49-51.) Taxpayer, however, makes no claim that the former amount was received in satisfaction of her community property interest in her husband's estate. Cf. *Harrison v. Commissioner*, 119 F. (2d) 963 (C. C. A. 7th).

than to her. The Government, on the other hand, contends that this income was "properly paid" to the taxpayer, and that it was there properly deductible by the estate and includable in her income for the taxable year.

It is at least the general rule that in the case of gifts of income from a testamentary trust, the income beneficiary is entitled to all income accruing from the date of the death of the testator, unless the will specifically provides otherwise.[8] *Harrison v. Commissioner,* 119 F. (2d) 963 (C. C. A. 7th); *Brown's Estate,* 190 Pa. 464; *Bridgeport Trust Co. v. Fowler,* 102 Conn. 318; *Matter of Stanfield,* 135 N. Y. 292; *Baker v. Fooks,* 8 Del. Ch. 84; *Ayer v. Ayer,* 128 Mass. 575; *Will of Leitsch,* 185 Wisc. 257; *Mulcahy v. Johnson,* 80 Colo. 499; *Poole v. Union Trust Co.,* 191 Mich. 162; *Blair v. Blair,* 122 Me. 500; I Restatement of Trusts, Section 234; 4 Bogert, Trusts and Trustees, Section 811. Taxpayer, however, relies upon two California cases, *Estate of Brown,* 143 Cal. 450, and *Clayes v. Nutter,* 49 Cal. App. 148, as laying down the principle that the

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[8]The reason for this rule is generally stated to be that the income beneficiary ranks first in the consideration of the testator, and a contrary construction would take from the income beneficiary a portion of the income, add it to the corpus, and thus, at the expense of the income beneficiary, enlarge the estate of the remainderman, who presumably stands second to the income beneficiary in the consideration of the testator. *Will of Leitsch,* 185 Wisc. 257. Cf. *Estate of Emerson,* 139 Cal. App. 571. Although the general rule is not confined to cases where the corpus of the trust fund is specifically designated property, as in the instant case (rather than the residue of the estate), the fact that corpus is so identified furnishes even stronger indication that the settlor intended the remainderman should receive no more than the property specifically designated as corpus.

income beneficiary of a trust is not entitled to the income earned subsequent to the death of the testator and prior to the time that the trust comes into existence.[9] Assuming *arguendo* that the California rule is not as broad as the general rule (but see *Estate of Van Wyck,* 185 Cal. 49), we think that an examination of the authorities relied upon by taxpayer will demonstrate their inapplicability to the present case.

In *Estate of Brown, supra,* the court was of the opinion that the question whether income from a testamentary trust accrued to the income beneficiary from the date of the testator's death turned upon the provisions of the then Section 1369 of the California Civil Code.[10] That section provided that legacies bear interest from the time that they are due and payable, except that legacies for maintenance *or to the testator's widow* bear interest from the date of the testator's death. The beneficiary of the testamentary trust in the *Brown* case was the half sister of the testatrix's husband. The only issue therefore presented for the court's consideration was whether the

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[9]Taxpayer's argument would have such intervening income fall into the corpus of the trust. In the instant case, upon the death of taxpayer, the corpus of the trust will go to testator's son. (R. 47-48.) Taxpayer apparently is more willing to relinquish all rights to the $5450 item than she is willing to pay any tax thereon. There is, however, nothing in the record to indicate that taxpayer has returned, or intends to return, this item to the corpus of the trust. Moreover, it is pertinent to note that while the income item of $5450, together with the income item of $6230, were distributed by the court decree of December 22, 1937, the securities which formed the corpus of the testamentary trust had previously been distributed to the trustee under an entirely separate court order of July 29, 1937. (R. 22-23, 49-51, 57.)

[10]Now Section 162 of the Probate Code.

trust created was a maintenance trust, in which case the income therefrom, just as in the case of trusts for the benefit of taxpayer's widow, would accrue from the date of the decedent's decease. The court in the *Brown* case concluded that the trust was not a maintenance trust, and the provisions of Section 1369, which provide for the accrual of income from the date of taxpayer's death in the case of maintenance and widow legacies were therefore inapplicable. In the instant case, however, taxpayer is the widow of the testator. Thus while she readily concedes that in the case of a maintenance trust the beneficiary is entitled to the income accruing from the testator's death by virtue of Section 1369 (see also *Estate of Dare,* 196 Cal. 29), she fails to recognize that the California statute applies the same rule to a beneficiary who is the widow of the testator as it applies to any beneficiary of a maintenance trust. In both instances the income accrues for the benefit of the beneficiary from the date of the testator's death.[11] In the present case, therefore, taxpayer, as the widow of the testator, was entitled to the $5450 income which was earned from the date of her husband's death, and which was distributed to her irrespective of whether the trust created was for her support.[12]

[11] There is some indication that in Delaware the general rule that income from a testamentary trust accrues to the income beneficiary from the date of the testator's death is limited to the widow, and possibly the children, of the donor. *Equitable Trust Co. v. Kent,* XI Del. Ch. 334.

[12] In *Clayes v. Nutter, supra,* relied upon by taxpayer, the beneficiary of the trust was a sister of the decedent.

But even apart from the above, it is the Government's contention, despite taxpayer's assertion to the contrary, that the trust herein was created for her support. The testator's will provided that the net income of the trust fund and estate should be paid to her during her life, and further "that if said income shall at any time be insufficient *for the proper support or care of my said wife*" then the trustee should at his discretion pay to her such portions of the principal of the trust fund and estate as should be deemed necessary. (Italics supplied.) (R. 47.) It is manifest, therefore, that the income of the trust was intended by her husband to be used for the support and maintenance of the taxpayer.

In asserting that the trust here involved was not established for her support, taxpayer points to the fact that she was receiving $1500 per month by way of a family allowance, as well as having reported some $57,000 net income in her individual tax return for 1937. Apart from the fact that her husband was obviously unaware of those circumstances at the time of setting up the trust in question, it has been specifically held that the receipt of a family allowance is "entirely immaterial" in concluding that a particular legacy was for the support and maintenance of the beneficiary. *Estate of Ballou,* 181 Cal. 61, 65. Likewise immaterial is the amount of income which taxpayer may have earned in the year subsequent to her husband's death; for a trust for the support of the income beneficiary may have been intended to provide for the maintenance of that beneficiary in the social and economic position in which he or she had been formerly living, and not merely to provide the beneficiary with the bare necessities of life. *Hartford-Connecticut Trust Co. v. Eaton,* 36 F. (2d) 710 (C. C. A. 2d).

We think it clear, therefore, that under any construction of her husband's will taxpayer was entitled to the $5450 income earned by the securities placed in trust. That income was distributed as income to the trustee under the December 22, 1937, decree of ratable distribution of the California court, and was received by taxpayer during the taxable year.[13] The trustee by distributing that sum to taxpayer has determined that the money in question was income. Taxpayer, by accepting such sum as income to which she was entitled, has acquiesced in that determination. Since that determination was justified by the terms of the will and the law of California, taxpayer should not be permitted successfully to question it here. Cf. *Commissioner v. Bishop Trust Co.,* 136 F. (2d) 390 (C. C. A. 9th). We submit, therefore, that the $5450 received by taxpayer during the taxable year represents an amount "properly paid" to her as a beneficiary within the meaning of Section 162(c) of the Revenue Act of 1936. It was thus correctly deducted from the gross income of the estate and included in computing her income as beneficiary. Cf. *Commissioner v. Bishop Trust Co., supra; White v. Commissioner,* 41 B.T.A. 525.

[13] It should be noted that the $5450 dividends were paid from time to time by the issuing corporations to taxpayer and her son, as executrix and executor of the estate, who credited the dividends to the trust. (R. 23, 37-38.)

CONCLUSION.

The decision of the court below is correct and should be affirmed.

Dated, October 29, 1943.

Respectfully submitted,

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